

Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction

An Introduction to the Problem

In a world of economic interdependence among countries, it is inevitable that economic policy in one state will have economic effects in others. The dilemma faced by the community of nations is that it is not possible for any existing state in this widely diversified world to match its laws fully to the dimensions of international trade.

Lately, other nations have called into question the wide substantive extraterritorial reach of U.S. antitrust laws.¹ To date a number of countries have enacted defensive, retaliatory legislation to inhibit the United States' reach. However, the British government's most recent action of enacting the Protection of Trading Interests Act² (POTI Act) represents the strongest action taken by a government to resist foreign pressures and foreign government policy "encroachment" in its territory.

The purpose of this note is to identify why the British were provoked into enacting such an assertive legislation.

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¹The U.S. antitrust statutes affecting foreign trade are Sherman Act, §§ 1 and 2 (15 U.S.C. §§ 1 and 2 (1976)), Clayton Act, §§ 3, 7, and 12 (15 U.S.C. §§ 14, 18, and 22 (1976)), Federal Trade Commission Act, §§ 4 and 5 (15 U.S.C. §§ 44 and 45 (1976)), Wilson Tariff Act, §§ 73, 74, 75, and 76 (15 U.S.C. §§ 8, 9, 10, and 11 (1976)), Webb-Pomerene Act, §§ 1, 2, 3, and 4 (15 U.S.C. §§ 61, 62, 63, and 64 (1976)); the problem faced in the extraterritorial reach of U.S. laws is not a problem peculiar to antitrust, but similar types of problems are also related to illicit payment, (Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78m, 78dd-1, 78dd-2, 78ff (1976)). There are some questions as to the Environmental Protection Act's extraterritorial reach too, (Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1976 and Supp. III 1979)).

²1980, c. 11; in force March 20, 1980; [Bill 66], Protection of Trading Interests Bill, introduced in the House of Commons on November 15, 1979, [hereinafter cited as Bill]; see Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L L. 257 (1981).

Exercise of Extraterritorial Jurisdiction

The question of extraterritorial jurisdiction covers a wide area. It covers crime generally and such particular questions as labor laws, securities laws, currency laws, shipping contracts, production of documents, and a host of others.³

The many facets of international trade usually are controlled by national legislation. However, the antitrust law has been the main focus of discussion, particularly the extraterritorial enforcement of these laws.⁴

The two major theories of extraterritorial jurisdiction at loggerheads in the U.S. British conflict are those of "the effects doctrine" and "strict territoriality." The U.S. adherence to "effects doctrine" is one extreme, and the U.K.'s "territoriality" is another.

The U.S. concept of legislative jurisdiction goes back to the doctrine of "effects."⁵ According to the "effects doctrine," any act abroad which was intended to and did affect U.S. interstate or foreign commerce is subject to U.S. antitrust laws, irrespective of the nationality of the parties or the place of occurrence.

At one time the United States supported the rule that a court in one state could order an act to be done in another state, provided the act did not violate the laws of the state in which it was to be performed.⁶ But later on, the same courts have assumed that they have authority to order or regulate conduct abroad, regardless of the fact that such an order might violate foreign statutes.⁷

The majority of nations, with a few exceptions,⁸ take a much narrower view and do not accept the "effects doctrine" as a basis for exercising jurisdiction in antitrust contexts. The nations opposing this doctrine argue that such a doctrine was meant to deal only with conduct which is universally recognized to be criminal in nature. Thus, nobody is troubled if courts

³Jennings, *The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes*, 2 GA. J. INT'L & COMP. L. 35 (1972).

⁴"The Antitrust laws of the United States, of the European Communities, and of the Member States which have such laws, are all capable of some kind of extraterritorial applications." COMMON MARKET AND AMERICAN ANTITRUST 50 (Rahl ed. 1970).

⁵*United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). ("Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . at least in cases where the conduct was intended to affect imports and did affect them."); see also ANTI-TRUST DIVISION, U.S. DEPT. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 6 (1977).

⁶RESTATEMENT OF CONFLICTS OF LAWS § 94 (1934); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 N.W. U. L. REV. 487, 502 (1969).

⁷See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 39 (1965): "(1) A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."

⁸See COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 31 (1977).

exercise wide extraterritorial jurisdiction in common crimes. An often quoted example supporting such an attitude is where a person standing in state *A* fires a shot that kills another person on the other side of the border in state *B*. In this case state *B*, the country where the person was killed (and thus, the effect was felt) would be considered to have subject matter jurisdiction.

The outlook reflected in the above example leads most countries to contend that since the violation of U.S. antitrust laws⁹ is not deemed to be a universal crime, the U.S. courts therefore cannot assume subject matter jurisdiction under the doctrine of "effects" when such effects are a result of anticompetitive conduct.¹⁰

Moreover, an assumption of jurisdiction over such conduct would be regarded as an infringement on their sovereignty. The alleged infringement is often viewed with indignation, as the one expressed by the House of Lords in *Rio Tinto Zinc*.¹¹ The British attitude toward the question of antitrust was officially stated in the case brought before the European Commission against a number of *Dyestuff* companies including *Imperial Chemical Industries* (ICI).¹² The British government took the somewhat unusual stand of issuing to the European Commission an *aide memoire* in which it stated that jurisdiction should not be exercised on the grounds of mere effects.¹³ In addition, an extraterritorial enforcement in a particular case sometimes conflicts with the specific policies or interests of other states. The *Uranium Case* is a classic example.¹⁴

From the perspective of many nations, the assumption of jurisdiction based on the economic effects may be viewed as an intrusion on their sovereignty, thereby justifying retaliation in the form of trade regulation legislation. Such an action may in turn result in the violation of the sovereignty of the state where the alleged conduct occurred. It seems to be a whole chain of events which in some way encroaches on the sovereignty of one state or the other.

Era of Retaliatory Measures

In the past the United States was the only country with comprehensively developed antitrust legislation.¹⁵ Recently there has been a remarkable

⁹See *supra* note 1.

¹⁰Griffin, *American Antitrust Law and Foreign Governments*, 13 J. INT'L L. & ECON. 137, 138 (1978).

¹¹*Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, All E.R. 434 (1977).

¹²Commission's Decision of July 24, 1969. Ruling on *Dyestuff Manufacturers*, 12 O.J. BUR. COMM. No. L195 (Aug. 1, 1969), [1965-1969] Transfer Binder (CCH) COMM. MKT. REP. 9314 (1969).

¹³Jennings *supra* note 3, at 38.

¹⁴*Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284 (N.D. Ill. 1978), *consolidated sub nom. In re Uranium Indus. Antitrust Litigation*, 466 F. Supp. 958 (Jud. Pan. Mult. Lit. 1978).

¹⁵*Supra* note 1.

change in the number of countries having antitrust laws. This change has occurred not only in the developed or industrial nations but also in developing or non-industrialized countries.¹⁶

The emergence of antitrust legislation in many countries is considered to be a direct rebuttal to the United States' extraterritorial enforcement of its antitrust laws.¹⁷ Indeed, a primary function of these counter legislations is to frustrate or resist foreign enforcement actions in their territories. A number of states now have "blocking" legislations,¹⁸ which bar compliance

¹⁶See *Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., pt. 2 630, 903, and 926 (1965) (Appendix, Antitrust Development and Regulations of Foreign Countries). Some of these newer laws exercise wider coverage than that of the U.S. antitrust laws. For instance, the antitrust legislation of the Organization for Economic Cooperation and Development (OECD) prohibits refusal to sell, an offense not included in U.S. laws. (See OECD, REPORT OF COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON REFUSAL TO SELL (1969)). The Scandinavian states were among the first group of nations to adopt a public cartel register, and a similar feature is now a part of many foreign antitrust laws. FUGATE, FOREIGN COMMERCE AND THE ANTI-TRUST LAWS 467 (2d ed. 1973). In West Germany section 98(2) of Gesetz gegen Wettbewerbsbeschränkungen reads:

This Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area.

¹⁷One such example is the United Kingdom's POTI Act. *Britain's new Protection of Trading Interests Bill—target America; though it applies to all countries—*. See *infra* note 27, at 66.

¹⁸E.g., Canada, United Kingdom, Australia, France, the Netherlands, New Zealand, South Africa, Switzerland, and West Germany. See Marks, *State Department Perspectives on Antitrust Enforcement Abroad*, 13 J. INT'L L. & ECON. 153 (1978); "The Australians have taken a far tougher line. This year they passed a law—and have used in the Uranium affair—empowering their government to declare unenforceable in Australia any foreign antitrust judgment that it deems extraterritorial or even merely against Australia's national interest." *Infra* note 27, at 66. See, e.g., Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 AUSTRAL. ACTS P. No. 121, § 5; Shipping Contracts and Commercial Documents Act, 1964, Laws of 1964 c. 87 § 2 (United Kingdom) (The POTI Act seeks to repeal this law; see Bill's Explanatory Memorandum, *supra* note 2, at i); Canada, various statutes preventing compliance with subpoenas in uranium litigation. Atomic Energy Control Act, 1970, CAN. REV. STAT. C. A-19, and Uranium Information Security Regulations, Stat. O. & R. 76-644 (1976). See *In re Westinghouse Elec. Corp. & Duquesne Light Co.*, 16 Ont. 2d 273 (1977). Canadian Foreign Proceedings & Judgments Bill, Bill No. C41, July 11, 1980; The statutes of two Canadian provinces also prohibit the production of any documents pursuant to the order of any other jurisdiction. Business Records Protection Act, 1947, ONT. REV. STAT. c. 54 (1970); Business Concerns Records Act 1964, QUE. REV. STAT. c. 278 records and data pursuant to a foreign court order and compliance with foreign antitrust orders, decrees, and judgments has been recommended by the REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY 408 (1968); In some other nations, they have general laws prohibiting the removal or furnishing of certain kinds of materials. See articles 89, 93, Law No. 17, Jan. 30, 1961, of the Republic of Panama, prohibiting the removal of, or copying of documents for use in an action outside of Panama in compliance with an order of an authority not of the Republic of Panama; quoted in application of *The Chase Manhattan Bank*, 297 F.2d 611, 612 (2d Cir. 1962); STGB, C.P., CODE. PEN. articles 271, 273 1951 ROLF 12, 1938 ROLF 846, prohibiting certain acts for a foreign state, and furnishing of secret economic information to a foreign official or firm; French Law Concerning Communication of Documents and Information of an Economic, Commercial, Industrial, Financial or Technical Nature to Aliens. See Law Pertaining to the Disclosure of Documents and Information of an Economic Commercial, Industrial, Financial, or Technical Nature or Juristic Persons, July 16, 1980; The Economic Competition Act of June 28, 1956, art. 39, stb. 401, as amended by Act of July 16, 1958, stb. 413 (Netherlands); "New Zealand has just joined Australia and the U.K. in passing legislation to restrict the flow of information to the

with foreign directives requesting inspection of documents or evidence located in their territory.¹⁹

British Government's Retaliatory Legislation against the United States Antitrust Laws

In the process of retaliation against U.S. antitrust laws, the strongest act to date comes from the United Kingdom. While the British have enacted a number of substantive antitrust laws since 1948,²⁰ the POTI Act is a purely retaliatory act.

In Parliament, the British secretary of trade made two fundamental points in support of the POTI Act. First, he emphasized the United Kingdom's strict adherence to the principle of territoriality as a basis of jurisdiction, arguing that the United States' "pernicious extraterritorial effects doctrine has created uncertainty for international industry in this country and elsewhere."²¹ Secondly, he viewed the imposition of treble damages by U.S. courts as penal rather than compensatory: treble damages are "by no stretch of the imagination mere restitution or reparation to the injured party."²²

United States on antitrust matters." *Financial Times*, Aug. 18, 1980, at 24, col. 5; South Africa, Atomic Energy Act, 1967, No. 90, § 30, 15 STAT. REP. SO. AFR. 1045 (1977); Switzerland: Section 271 of the Swiss Penal Code apparently imposes criminal sanctions on any person who, without permission of the Swiss government, provides documents on behalf of a foreign government; West Germany, Law of May 24, 1965, § 11 (1965) *Bundesgesetzblatt* [BGBl] II 835; British Commonwealth, resolution by 41 British Commonwealth Nations encouraging all members of the commonwealth to pass legislation curtailing extraterritorial application of United States procedural and antitrust laws. [1980] ANTITRUST & TRADE REG. REP. (BNA), at A-10, May 8, 1980.

¹⁹See KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS, section 94.09(1) (1977); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974).

²⁰The monopolies and mergers in the United Kingdom are controlled by the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948 (11 and 23 Geo. 6, c. 66, reprinted in 3 OECD GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, § 1.0 (United Kingdom) (hereinafter cited as OECD Guide); MERGERS, CONSOLIDATION AND BIG BUSINESS (The Dichley Foundation, 1970); WILBERFORCE, CAMPBELL AND ELLES, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES (2d ed. 1966, with 1969 supplement)) and the Monopolies and Mergers Act of 1965 (3 OECD GUIDE, § 1.1). The Monopolies and Restrictive Practices Commission Act of 1953 provided for the enlargement of the Commission. The Restrictive Trade Practices Act of 1956 (4 and 5 Eliz. 2, c. 68, 3 OECD GUIDE, § 1.2) and that of 1968 (3 OECD GUIDE, § 1.5) are the statutes which deal with restrictive business practices. The Fair Trading Act of 1973 created the office of Director General of Fair Trading with the power to make reference to the commission. The other relevant legislation is the 1964 Shipping Contracts and Commercial Documents Act (Shipping Contracts and Commercial Documents Act, 1964) (the POTI Act seeks to repeal this Act). (Bill's Explanatory Memorandum, *supra* note 2, at i.) This act was enacted primarily to thwart the Federal Maritime Commission's investigation of North Atlantic Conference activities which involved English vessels. (Shipping Contracts and Commercial Documents Act, 1964).

²¹See Hansard, November 15, 1979, 1533-1591.

²²Jennings, *Extraterritorial Jurisdiction and the United States Antitrust*, 33 BRIT. Y.B. INT'L 146, 148 (1957).

The factors which led the British government to enact the POTI Act trace back to instances such as the famous *Imperial Chemical Industries* litigation.²³ The British court enjoined ICI to comply with the decree issued by the U.S. court.²⁴ The vital element which served as a catalyst for the introduction of the POTI Act was the U.S. Justice Department's convening of a grand jury to investigate the alleged international uranium cartel.²⁵ In 1977, the House of Lords rejected Westinghouse Electric's attempt to obtain evidence relating to the alleged international uranium cartel.²⁶ Furthermore, the British were also alarmed by the actions filed by private American interests seeking damages from two mainly British consortia that had taken part with several others in cartelized fare-fixing on the north Atlantic.²⁷

In the presence of these conflicts, one observer remarked that "the British government, like several others, is fed up with American attempts to extend American antitrust law to things—like the uranium cartel, whose reality is scarcely in question—done outside America by non-Americans."²⁸ Another writer believes that the present act exists because "the simmering British frustration has come to a full boil."²⁹ He is further of the opinion that "the level of conflict" between the United States and the United Kingdom, "has continued to rise in recent years," and outlines the following reasons for such a rise.

First the U.S. antitrust enforcement agencies have been increasingly active in international business practices. Secondly, in accordance with its general policy, the Justice Department has increasingly investigated in this field by use of the grand jury. . . . Thirdly, the United States has been willing to prosecute as antitrust violations private business conduct which a foreign government has—at least privately—favored, encouraged or facilitated. Finally, expansion of British companies into the United States during the past decade has produced some highly visible merger suits (such as *BP-Sohio*) (1970 Trade Cases (CCH), ¶ 72988 (N.D. Ohio 1969)) and *British Oxygen-AIRCO* (557 F.2d 24 (2d Cir. 1977)) which has been widely criticized by the British press as discriminatory and protectionist.³⁰

²³United States v. Imperial Chem. Indus., Ltd. 100 F. Supp. 504 (S.D.N.Y. 1951) [hereinafter cited as ICI].

²⁴British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953], 2 All E. R. 780 (C.A.) (injunction by lower court against compliance with U.S. decree affirmed; American decree was "intrusion" on British sovereignty); British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1955], 1 Ch. 19, [1952], Ch. 37, 1954, 3 All E. R. 88 (Ch.).

²⁵See generally *United Nuclear Wins Judgment in Uranium Case*, Wall St. J., Mar. 3, 1978, at 6; *U.S. Charges Gulf Oil in Uranium Price Fixing*, Washington Post, May 10, 1978, at A2; see also Kohlmeier, *The Uranium Affair*, 13 J. INT'L L. & ECON. 149 (1978).

²⁶*In re Westinghouse Elec. Corp. Uranium Contract Litigation*, [1978], 2 W.L.R. 81 (H.L. 1977).

²⁷THE ECONOMIST, November 3-9, 1979, at 64-66.

²⁸*Id.* at 66.

²⁹Baker, *U.K. Using New Weapons to Attack Foreign Reach of U.S. Trust Laws*, NAT'L L.J., January 14, 1980, at 24.

³⁰*Id.* at col. 1-2.

Extensive discussions between the governments of the United States and the United Kingdom took place, but of no great consequence. So "[e]nough's enough—this bloody nonsense has to stop," was the attitude of the present government in the United Kingdom.³¹ In September, 1979, the British secretary of trade announced publicly that his government would bring in legislation to make some of the U.S. judgments unenforceable,³² and in November of the same year the government did introduce the POTI bill in the Parliament which later became the POTI Act.

The POTI Act is intended to provide "protection for persons in the United Kingdom from certain measures taken under the laws of overseas countries when those measures apply to things done outside such countries. . . ." ³³ The POTI Act empowers the trade secretary to take measures to restrict the trade regulation efforts of another government covering "things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom, are damaging or threaten to damage the trading interests of the United Kingdom. . . ." ³⁴

The act under section 2 authorizes the secretary of trade to prohibit export of documents in compliance with foreign directives to a court, tribunal or authority of an overseas country. The POTI Act also provides that a British court shall refuse discovery requests, if it is shown that the request "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom."³⁵ Section 3 is a penal clause and provides penalties for failure to comply with the requirements under sections 1 and 2.³⁶ British courts under section 5 are enjoined from entertaining any foreign multiple damage awards,³⁷ and also under section 4, when the secretary of state has given a certificate that the recovery request, "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. . . ." ³⁸ The trade secretary's certificate is binding on the courts.

Finally, the unique provision of the POTI Act is section 6. This clause in the act provides that British citizens, U.S. corporations, and other persons carrying on business in the United Kingdom, who have been subject to multiple damage judgment overseas, are entitled to recover, through the British courts, from the party to whom the damages were awarded.³⁹

³¹*Id.* at col. 2.

³²*Supra* note 27, at 66.

³³Bill's Explanatory Memorandum, *supra* note 2, at i.

³⁴POTI Act, *supra* note 2, at § 1(1)(b).

³⁵*Id.* at § 2(2)(a).

³⁶*Id.* at § 3.

³⁷*Id.* at § 5.

³⁸*Id.* at § 4.

³⁹*Id.* at § 6.

Conclusion

The real question focuses on whether it is possible to formulate any principles or procedures which will moderate and make reciprocally tolerable these encroachments on state sovereignty.⁴⁰ The difficulty of concurrent jurisdiction does not arise where there is a common interest in the exercise of jurisdiction. Such a common interest, at any rate within limits, may be created through bilateral or multilateral arrangements. Or, what is needed is a moderate approach, such as the "jurisdictional rule of reason"⁴¹ suggested by the U.S. Court of Appeals for the Ninth Circuit.

If the present situation with regards to extraterritorial enforcement persists, it would appear that there will soon be a flood of "Protection of Trading Interests Acts," and not just confined to antitrust contexts but arising in other areas too.

⁴⁰See INTERNATIONAL LAW ASSOCIATION REPORT OF THE FIFTY-FIRST CONFERENCE, (Tokyo 1964), comments by McDougal, 331.

⁴¹*Timberland Lumber Co. v. Bank of America Nat'l Trust & Savings Ass'n*, 549 F.2d 597, 614 (9th Cir. 1977).